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No. 76-1789

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT RUCKER, PETITIONER

v.

GRIFFIN B. BELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 552 F. 2d 998. The opinion of the district court appears at Pet. App. 17a-22a.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 1977. The petition for a writ of certiorari was filed on June 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Congress may condition its statutory grant of citizenship to a person born abroad to a citizen parent and an alien parent upon a requirement that the person

reside in this country for five years before attaining the age of 28.

2. Whether the statutory requirement of residence in this country in order to retain citizenship is applicable to a person who had no knowledge of the requirement.

3. Whether application of the residence requirement to divest the statutorily-granted citizenship of a person who had no knowledge of the requirement is consistent with the Due Process Clause of the Fifth Amendment.

STATEMENT

Petitioner brought this suit in the United States District Court for the District of New Jersey seeking a declaratory judgment that he is a citizen of the United States. The district court, after a non-jury trial, entered judgment against petitioner (Pet. App. 17a-24a) on the ground that he had failed to comply with the provisions of Section 301 of the Immigration and Nationality Act, 66 Stat. 235, as amended, 8 U.S.C. 1401, or its predecessor statutes[1] relating to retention of citizenship by persons born outside the United States to parents of whom one is a citizen and one is an alien. The court of appeals affirmed (Pet. App. 1a-14a).

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[1]At the time of the petitioner's birth in 1939, the applicable statute was R.S. 1993, as amended in 1934, 48 Stat. 797, formerly 8 U.S.C. (1934 ed.) 6, which provided:

> Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of the birth of such child is a citizen of the United States, is declared to be a citizen of the United States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization.

The essential facts are not in dispute and are set out in the opinion of the court of appeals (Pet. App. 2a-5a). Petitioner was born in Argentina on August 30, 1939.

This provision was carried forward in slightly modified form in Section 201(g) and (h) of the Nationality Act of 1940 (54 Stat. 1139), and in Section 301 of the Immigration and Nationality Act (66 Stat. 235). The 1952 law, which was applicable from petitioner's 13th birthday until after he became 28 in 1967, provided in pertinent part:

> (a) The following shall be nationals and citizens of the United States at birth:
>
> (1) a person born in the United States, and subject to the jurisdiction thereof;
>
> * * * * *
>
> (7) a person born outside the geographical limits of the United States and its outlying possessions of parents one of whom is an alien, and the other a citizen of the United States who, prior to the birth of such person, was physically present in the United States or its outlying possessions for a period or periods totaling not less than ten years, at least five of which were after attaining the age of fourteen years: *Provided* * * *
>
> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a), of this section shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.
>
> (c) Subsection (b) shall apply to a person born abroad subsequent to May 24, 1934 * * *.

In 1972, after petitioner had reached the age of 28, the statute was amended again to reduce Section 301(b)'s residence requirement for retention of citizenship to "a period of not less than two years between the ages of fourteen years and twenty-eight years." 86 Stat. 1289.

His mother was a citizen of Argentina; his father, Max Rucker, was a United States citizen by birth. At the time of his birth, petitioner acquired United States citizenship under R.S. 1993, as amended in 1934, 48 Stat. 797,[2] which provided that a person born abroad of a citizen parent and an alien parent was a United States citizen at birth and would retain citizenship if (1) he resided in the United States for five years immediately prior to his eighteenth birthday, and (2) he took an oath of allegiance to the United States within six months after reaching the age of twenty-one (Pet. App. 2a).

On January 17, 1941, Max Rucker registered petitioner's birth with the United States Embassy in Buenos Aires. The Embassy issued a Report of Birth, which quoted on its back the residence requirement established by R.S. 1993, as amended. Max Rucker became aware of this requirement at that time and it is stipulated that at all times material to this lawsuit Max Rucker was aware of the existence of residence requirements for the retention of citizenship and that he was aware of their applicability to his son, petitioner Robert Rucker. Subsequently, Max Rucker registered himself and petitioner as citizens of the United States at the Buenos Aires Embassy in 1943, 1946, 1955, and 1957.[3] In 1962, after petitioner had reached his

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[2]See note 1, *supra*.

[3]In registering petitioner's citizenship in 1955, Max Rucker also reported the birth of his daughter Alice, who had been born in 1942. When the form was returned to Max Rucker after processing, it contained notice of the 1952 amendments to the Immigration and Nationality Act, providing that divestiture of citizenship would occur if the individual whose birth was reported failed to "come to the United States and remain physically present therein for 5 years between the ages of 14 and 28."

majority, Max Rucker registered himself alone. That same year, petitioner was married in Argentina at the age of twenty-two (Pet. App. 3a-4a).

Max Rucker left Argentina for the United States in 1964. Petitioner remained there until 1968, when he came to the United States (Pet. App. 4a). He traveled on an Argentinian passport (Tr. 31)[4] and with a tourist visa issued by the United States Embassy in Lima, Peru, where he had gone on a business venture (Tr. 32). Prior to obtaining this visa, petitioner had never been in contact with the United States Embassy in Buenos Aires, with any other embassy or consulate of the United States, or with any other agency of the United States Government to reregister himself as a citizen, to inquire about his citizenship, or to register for the draft. See Tr. 48-58. Petitioner entered the United States for the first time on September 26, 1968. He was twenty-nine years old. The applicable citizenship statute at that time was Section 301 of the Immigration and Nationality Act, as amended, 8 U.S.C. 1401,[5] which required residence in this country for a period of five years between the ages of 14 and 28.

In May 1969, petitioner applied to the Immigration and Naturalization Service for a certificate of citizenship. His application was denied, after an evidentiary hearing, on the ground that he had not complied with the retention requirements of 8 U.S.C. 1401(b) or any of its predecessor statutes. Petitioner then brought this action.

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[4]"Tr." refers to the transcript which is part of the record before the court of appeals.

[5]See note 1, *supra*.

The district court and the court of appeals, relying on this Court's decision in *Rogers* v. *Bellei*, 401 U.S. 815, held that petitioner's claim to citizenship was entirely statutory in nature and that, having failed to comply with the statutory requirement, petitioner was not entitled to a declaratory judgment of citizenship.

ARGUMENT

1. Petitioner argues (Pet. 17) that the Citizenship Clause of the Fourteenth Amendment precludes Congress from enacting any retention provision conditioning the citizenship of children born abroad to a citizen parent and an alien parent. However, the Citizenship Clause applies by its terms only to "persons born or naturalized in the United States and subject to its jurisdiction," and not to persons like petitioner who were born abroad and whose claim of inherited citizenship is based solely on legislative enactment. In *Rogers* v. *Bellei, supra,* this Court held that Congress possessed the constitutional authority to subject such "presumptive citizenship" (401 U.S. at 835) to Section 301(b)'s residence requirement and that imposing such a condition subsequent for retention of non-Fourteenth Amendment citizenship was "not unreasonable, arbitrary, or unlawful" (401 U.S. at 831). Petitioner asks the Court to reconsider *Rogers* v. *Bellei* (Pet. 17). But there is no reason to doubt the continuing vitality of that decision and petitioner suggests none. Consequently, further review in this Court of petitioner's claim that Section 301(b) is *per se* unconstitutional is unwarranted.

2. Petitioner also claims (Pet. 10-12) that the statutory retention requirement does not apply to a person "subjectively unaware" of it (Pet. 7), as the district court found that he was (Pet. App. 20a), and that "[i]f not construed to require the citizen's knowledge of its provisions, the retention requirement is open to serious constitutional challenge * * * under the due process clause" (Pet. 12).

The language of Section 301(b) is exacting:

> (b) Any person who is a national and citizen of the United States at birth under paragraph (7) of subsection (a) of this section, shall lose his nationality and citizenship unless he shall come to the United States prior to attaining the age of twenty-three years and shall immediately following any such coming be continuously physically present in the United State[s] for at least five years: *Provided*, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.[6]

The language in no way limits the residence requirement to persons who have knowledge of its provisions, and to infer such a limitation would be inconsistent with the congressional purpose. In enacting Section 301 Congress generously extended the privilege of inherited citizenship to persons born abroad; however, because of the inherent dangers of dual citizenship and dual allegiance, Congress conditioned the statutorily granted citizenship on a requirement of residence in this country for a period of years. *Rogers* v. *Bellei, supra,* 401 U.S. at 831-835. "Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do * * *." *Id.* at 835. To construe the statute "to require the citizen's knowledge of its provisions," as petitioner urges (Pet. 12), would undermine

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[6] 8 U.S.C. 1401(b).

the congressional accommodation, substituting a subjective test for the congressional decision to rely on "residence in this country as the talisman of dedicated attachment." *Rogers* v. *Bellei, supra,* 401 U.S. at 834.

As a practical matter, such an interpretation would substantially negate the retention requirement, since 8 U.S.C. 1481(c) requires the government to sustain the burden of proof in a case such as this (see the district court's opinion, Pet. App. 21a). Cf., *e.g.*, *Woodby* v. *Immigration and Naturalization Service,* 385 U.S. 276, 285. To sustain the burden of proving that a person had subjective knowledge of the law's requirement, against the person's predictable denial of such knowledge, would be a formidable and often insuperable challenge for the government. The result might well be to emasculate the residence requirement and thus "convert what is congressional generosity into something unanticipated and obviously undesired by the Congress." *Rogers* v. *Bellei, supra,* 401 U.S. at 835.

3. Application of Section 301(b) to a person not shown to have had subjective knowledge of the residence requirement does not offend due process. Petitioner argues (Pet. 13) that the statute as so construed and applied would create an "unwarranted conclusive presumption" that non-Fourteenth Amendment citizens who have not met the residence requirement lack the attachment to the United States that warrants perfection of their citizenship. But Congress was free to make reasonable choices in conditioning statutory citizenship so as to deal with "the dual nationality dilemma" (*Rogers* v. *Bellei, supra,* 401 U.S. at 833) and also with the difficulty of proving subjective knowledge. Cf. *Fiallo* v. *Bell*, No. 75-6297, decided April 26, 1977, slip op. 12, n. 8. Congress chose to make residence in this country for a prescribed period, rather than a subjective state of mind, the "ultimate

fact" on which retention of the statutory citizenship turns. If this choice was reasonable there is no "unwarranted conclusive presumption"; indeed, there is no presumption at all, but only a permissible legislative purpose (assuring attachment to the country) rationally linked to the chosen legislative test (a period of residence). And as the Court held in *Rogers* v. *Bellei, supra* (401 U.S. at 833):

> The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but * * * we cannot say that it is irrational or arbitrary or unfair.

Petitioner emphasizes (Pet. 9) the Court's statement in *Rogers* v. *Bellei, supra*, 401 U.S. at 836, that that case involved "no claim of ignorance or of mistake or even of hardship." But nothing in *Bellei* indicates that operation of the residence requirement is constitutionally precluded when the presumptive citizen asserts, or when the government cannot disprove, his subjective ignorance of the law. As noted above, the difficulty of disproving such an assertion could negate the requirement.

Further, the claimant in *Bellei* had knowledge of Section 301(b)'s requirements precisely because of his repeated contacts with American embassy officials (see 401 U.S. at 819). Petitioner, in contrast, made no contact with American officials concerning his citizenship status at any pertinent time (see Pet. App. 5a-6a, 20; Tr. 48-58). Especially where petitioner took none of the available steps to inform himself about his status, the Constitution does not preclude application of the retention requirement to him because he remained ignorant of it.[7]

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[7]Petitioner argues (Pet. 16-17) that the failure of the consulate to notify him of the residence requirement precludes its application to deny him citizenship. A similar claim was rejected by this Court in *United States Immigration and Naturalization Service* v. *Hibi,* 414 U.S. 5. See also *Santiago* v. *Immigration & Naturalization Service,* 526 F. 2d 488, 491-493 (C.A. 9) (*en banc*), certiorari denied, 425 U.S. 971.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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